## RECENT CASES.

BANKRUPTCY—REPLEDGE BY STOCKBROKERS OF CUSTOMERS' SECURITIES ON MARGIN ACCOUNTS—CONTRIBUTION REQUIRED FROM THOSE WHOSE SECURITIES WERE NOT SOLD BY PLEDGEE TO THOSE WHOSE SECURITIES WERE SOLD.—The petitioner delivered to stockbrokers, as security on his margin account, certain bonds which they repledged to secure a loan made to them by a third party. The securities of other customers were also repledged in the same transaction. After the stockbrokers had become bankrupt, the pledgee satisfied its claim against the bankrupts by the sale of some of the securities. The petitioner's bonds survived the sale. He brought reclamation proceedings to recover them from the receiver. *Held:* The petitioner's bonds, which had been lawfully repledged by the stockbrokers, were liable for contribution to the owners of the other securities which had been similarly repledged and had been sold by the pledge. *In re* Toole *et al.*, 274 Fed. 337 (C. C. A. 1921).

The majority of the court is of the opinion that the stockbrokers lawfully repledged the petitioner's bonds. The owners of all the securities which were lawfully repledged are treated as co-sureties for the payment of the brokers' indebtedness. The decision is based on the principle that "equity will treat alike those similarly situated." It finds support in *In re* Stringer, 230 Fed. 177 (D. C. 1916), and in Unangst v. Roe, 177 N. Y. S. 706 (1919). In the leading case of Hudson's Appeal in *In re* McIntyre & Co., 181 Fed. 955, 104 C. C. A. 419 (1910), contribution was also required, but no emphasis at all was laid upon the fact that the situations of the owners of the securities were similar in respect to the brokers' right to repledge them. The court in the instant case fears that if contribution is not required, the door will be opened for corrupt bargains between the owners of securities and the pledgee.

The repledging of the petitioner's bonds was unlawful in the opinion of Manton, Circuit Judge, who dissents. In deciding that these bonds are not liable for contribution to any of the other customers, irrespective of the similarity of their situations, he prefers to follow the rule of Pippey's Appeal in *In re* McIntyre & Co., *supra;* Loeser's Appeal in *In re* McIntyre & Co., 189 Fed. 46 (1911); and Johnson v. Bixby, 252 Fed. 103, 164 C. C. A. 215 (1918), rather than that of Gould v. The Central Trust Co., 6 Abb. N. C. 381 (N. Y. 1879); Whitlock v. The Bank, 29 Misc. Rep. 84, 60 N. Y. S. 611 (1899); and *In re* Wilson & Co., 252 Fed. 631 (D. C. 1917). It is immaterial that other customers have also had their securities unlawfully repledged. *In re* McIntyre & Co., *supra;* Johnson v. Bixby, *supra.* The case of Whitlock v. The Bank, *supra,* has been questioned in Tompkins v. Morton Trust Co., 91 App. Div. 274, 285, 86 N. Y. S. 520, 528 (1904).

Though the decision of the majority seems correct, since it was of the opinion that the petitioner's bonds were lawfully repledged, yet, it is submitted, the most important factor in these cases is not the one which is emphasized here, *viz.,* the similariy of situation of the customers in regard to the lawful or the unlawful repledging of their securities. If the repledg-

ing has been unlawful in the case of two customers it seems unjust to require the one to contribute to the other. A wrong amounting to a theft has been committed upon both, neither of whom is at fault or has been benefitted by the wrongful act. Justice does not require the more fortunate to share the loss of the other. The dissenting opinion in its adoption of the rule of Pippey's Appeal in *In re* McIntyre & Co., *supra,* and of Johnson v. Bixby, *supra,* seems to represent the better view.

It should be noted that the majority of the court in the instant case and the court in *In re* Wilson & Co., *supra,* construe the opinion in Pippey's Appeal in *In re* McIntyre & Co., *supra,* as not in conflict with their view. This construction appears not to be justified.

BILLS AND NOTES—RECOVERY BY DRAWEE OF MONEY PAID ON FORGED CHECKS—BURDEN OF PROOF.—The plaintiff, the drawee of twelve checks drawn on different dates to the order of Leiberman, sued the defendant (the last endorser) to recover the money paid out. Leiberman forged the name of the drawer and endorsed the checks in blank. Three other endorsements, all of which were full and not merely for collection, appeared on the checks. *Held:* The plaintiff cannot recover, notwithstanding that the N. I. L. [Sect. 62] has not repealed the Act of 1849 as to recovery of money paid without prior acceptance. Union National Bank v. Farmers' & Mechanics' National Bank, 114 Atl. 506 (Pa. 1921).

The state courts of the United States in which the question has arisen, have held, with a few exceptions, that under the N. I. L. a drawee who has paid out money on a forged check cannot recover the money. The act provides only for cases where there has been an acceptance, but the courts argue that the payment includes an acceptance, and that therefore the act applies. National Bank of Rolla v. First National Bank of Salem, 141 Mo. App. 719, 125 S. W. 513 (1910); Bergstrom v. Ritz Carlton Co., 171 App. Div. 776, 157 N. Y. S. 959 (1916).

In Pennsylvania, however, the doctrine of Price v. Neal, 3 Burr. 1354 (Eng. 1762) had been overthrown by the Act of April 5, 1849, P. L. 426, which provided that the drawee might recover where it had paid money on a forged check, with or without prior acceptance. However, the drawee was still presumed to know the signature of the drawer, and the general principles of commercial law, in regard to negligence were applicable; there was the same necessity as before, for care, diligence and proper notice. Iron City National Bank v. Fort Pitt National Bank, 159 Pa. 46, 28 Atl. 195 (1893). Since the N. I. L. [Sect. 62], it is held that, inasmuch as it does not expressly cover the case of payment without prior acceptance, the Act of 1849 has not been repealed insofar as it covers cases of this class. Colonial Trust Company v. National Bank, 50 Pa. Super. 510 (1912); Union National Bank v. Franklin National Bank, 249 Pa. 375, 94 Atl. 1085 (1915).

In the principal case all of the parties to the checks, with the exception of the drawee, used the utmost care and relied on the acts of the drawee as assurance that the check was good. The money was paid to the forger. Due to the delay by the drawee in giving notice of the forgery, the benefit of an action against the forger was lost, and therefore there was injury, un-

less it appeared that there were funds belonging to the forger, from which defendant could reimburse itself. Leather Manufacturers' National Bank v. Morgan, 117 U. S. 96, 29 L. Ed. 811 (1885); McNeely v. Bank of North America, 221 Pa. 588, 70 Atl. 891 (1908). The drawee cannot recover unless it appears that no innocent party will be injured thereby as a result of the drawee's negligence.

On whom is the burden of proof in such a case? This point was decided for the first time in the principal case. It was held that the burden was on the plaintiff, because the defendant had set up as a defense the plaintiff's negligence through which the defendant would suffer loss if the plaintiff were allowed to recover. Then, applying the general rule, the burden is on the party against whom the decision of the tribunal would be given if no further evidence were introduced, that is, the plaintiff.

CONSTITUTIONAL LAW—IMPAIRING CONTRACT OBLIGATION—EXEMPTION OF INSURANCE MONEYS FROM ANTECEDENT DEBTS.—While defendant's intestate was indebted to the plaintiff, and after he had taken out two life insurance policies, a Louisiana statute was passed providing that the avails of insurance, made payable to an assured's estate, should be exempt from liability for his debts. *Held:* The avails from the intestate's policies were not exempt from liability for antecedent debts due the plaintiff. Bank of Minden v. Clement, 41 Sup. Ct. 408 (U. S. 1921).

Article 1, section 10 of the Federal Constitution provides: "No state shall . . . pass any . . . law impairing the obligation of contracts." The "obligation" of a contract was early explained by Marshall, C. J., as meaning the binding force which the law gives it, and any statute which "releases a part of this obligation . . . must impair it." Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. Ed. 529, 549 (U. S. 1819).

There is recognized in that case a distinction between the obligation and the remedy after breach of the contract. The latter may be altered without impairing the obligation, the court declares, yet it also states: "Future acquisitions are . . . liable for contracts; and to release them from this liability impairs their obligation." Sturges v. Crowninshield, *supra,* at p. 198. Though admitting this distinction, the earlier cases assume that a diminution of the remedy *may* impair the obligation. Bronson v. Kinzie, 1 How. 311, 316, 317, 11 L. Ed. 143, 145 (U. S. 1843); Planters' Bank v. Sharp, 6 How. 301, 327, 330, 12 L. Ed. 447, 458, 459 (U. S. 1848). How this could be possible under any circumstances, short of abolition of all remedy, is difficult to understand—it seems obvious that, logically, it could not. In later cases the remedy is said to be a part of the obligation. Gunn v. Barry, 15 Wall. 610, 623, 21 L. Ed. 212, 215 (U. S. 1872); Edwards v. Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793, 796 (1877). If this premise is true, it would seem to follow that *any* diminution of the remedy must amount to an impairment of the obligation. Yet the courts, though starting with this premise, have upheld as constitutional, statutes which exempt from attachment for antecedent debts small amounts of property of a kind peculiarly essential to the owner's welfare. Taylor v. Stockwell, 66 Ind. 505 (1879); Morse v. Goold, 11 N. Y. 281 (1854). In these cases the obligation is said to be impaired if a substantial remedy is left

to the creditor. It is evident from the *dictum* in Bronson v. Kinzie, *supra*, at p. 315, that the courts which construe these exemption statutes as operating on antecedent debts, reach this conclusion largely because they feel that such legislation is of wise "policy and humanity."

McLean, J., dissents in a clear, logical opinion in Bronson v. Kinzie, *supra*. He ridicules the premise that the remedy is a part of the obligation. He believes that the remedy may be modified at the legislature's discretion. In Bigelow v. Pritchard, 21 Pick. 169 (Mass. 1838), the court says the remedy may be changed or diminished, but may not be abolished. An obscure and unsatisfactory position is taken when it is stated in Bronson v. Kinzie, *supra*, at p. 316: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract."

The instant case declares that no impairment of the obligation, however slight, is allowed. This is in conflict with the statement in Edwards v. Kearzey, *supra*, at p. 601, that the impairment must be material to come under the constitutional prohibition.

This is a case of first impression in the United States Supreme Court in respect to the exemption of insurance avails. The decisions in all the state courts (except in Louisiana, from which the appeal in the instant case was taken) are in accord with the decision in the instant case. Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894); Skinner v. Holt, 9 S. D. 427, 69 N. W. 595 (1896); *In re* Heilbron's Estate, 14 Wash. 536, 45 Pac. 153 (1896). A Pennsylvania statute (Act of May 3, 1917, P. L. 112) similar to that in Louisiana has not yet been construed by the courts.

The decisions in these exemption cases generally seem satisfactory. The opinions, however, often leave much to be desired. They are criticized in an excellent note in 5 Am. Law Reg. (N. S.) 91. In the instant case, the opinion would have been more satisfactory if the court had applied more closely to the facts of the case the broad principles which it quoted.

CORPORATIONS—EFFECT OF DISSOLUTION OF LESSEE CORPORATION UPON THE LEASE.—The corporation, a lessee of land, was dissolved by an act of the legislature before the term of the lease had expired. All debts had been paid and the lease became valuable because of the increased value of the land. *Held:* The lease was not terminated at dissolution, and the stockholders are entitled to the lease. Cummington Realty Associates v. Whitten, 132 N. E. 53 (Mass. 1921).

There appear to be only three American cases, prior to the principal case, deciding the specific point as to whether or not a lease is terminated by the corporation's dissolution. The lease in each one of them figured as a liability upon the corporation, and the cases held alike that the lease did not terminate. The lessor in each case was thereby held to be entitled to damages for the corporation's failure to occupy for the full term. People v. National Trust Co., 82 N. Y. 283 (1880); Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332 (1895); *In re* Millings Clothing Co., 238 Fed. 58, 151 C. C. A. 134 (1916). In England, it seems, there has been but one adjudication upon this question and there it was held that the lease did terminate. Hastings Corp. v. Letton, L. R. (1908) 1 K. B. 378 (Eng.).

The American decisions are clearly at variance with the English common law, which provided that upon dissolution a corporation's rights and liabilities ceased; its lands and tenements reverted to the grantor, and its personalty vested in the crown. Hastings Corp. v. Letton, *supra;* White v. Campbell, 5 Humph. 38 (Tenn. 1844); 2 Kent Comm. 307, 5th Ed. (1844). This rule, however, was at an early date displaced in most American jurisdictions by the "equitable trust fund rule," by which a corporation's rights and liabilities do not not cease at dissolution, and the rights or assets are protected in equity as a trust fund for creditors and stockholders. Wood v. Dummer, 3 Mason 308 (C. C. 1824); Folger v. Columbian Ins. Co., 99 Mass. 267 (1868); Pocono Ice Co. v. Am. Ice Co., 214 Pa. 640, 64 Atl. 398 (1906); *In re* Millings Clothing Co., *supra*; 10 Cyc. 1329 (1904).

The principal case does not represent any departure from the established law, but is novel in that it involves an asset in the form of a lease. However, the rights acquired under any other contract are provided for by the authorities last cited. The principal decision is in perfect harmony with those authorities.

CORPORATIONS—POWER OF PRESIDENT TO ANSWER SUITS WITHOUT AUTHORITY OF DIRECTORS.—A petition for involuntary bankruptcy was filed against a corporation on grounds of insolvency and fraudulent transfers. Two of the corporation's four directors opposed adjudication, and two, who were among the petitioning creditors, favored it. The president, on behalf of the corporation, but without having been authorized to do so by the directors, verified and filed an answer, denying the allegations of the petition. A motion to strike out the answer, as being unauthorized, was denied. *Held:* The motion was properly rejected and the answer should be permitted to stand. Regal Cleaners & Dyers v. Merlis, 274 Fed. 915 (C. C. A. 1921).

Whether or not the president of a corporation has authority to do a particular act usually depends upon the powers conferred upon him, either by the charter, or by the stockholders or directors. Power Co. v. City Council, 114 Ala. 433, 21 So. 960 (1896). He may, however, without any special authority from the board of directors, perform all acts of an ordinary nature which, by usage or necessity, are incident to his office. Stokes v. N. Y. Pottery Co., 46 N. J. L. 237 (1884). As to matters of litigation, it has been held that, by virtue of his office merely, a president has no implied authority to institute suits on behalf of the corporation, or to appear for it in suits against it. Ashuelot Co. v. Marsh, 1 Cush. 507 (Mass. 1848); Citizens' Bank v. Keim, 32 Leg. Int. 90 (Pa. 1875); Bright v. Metairie Assoc., 33 La. Ann. 58 (1881). On the other hand, he may have such power by his having been customarily authorized or permitted to attend to such matters, or where he was general manager of the business, Sarmiento *et al.* v. Davis Boat Co., 105 Mich. 300, 63 N. W. 205 (1895); or where such is incident to his office—usually in the case of bank presidents. Bank of Cincinnati v. Benton, 2 Metc. 240 (Ky. 1859); Bank of Kingman v. Berry, 53 Kan. 696, 37 Pac. 131 (1894).

The decision in the principal case is based on entirely different grounds. The court reasoned that, since proceedings in bankruptcy are in the nature

of proceedings in equity, if there was a defense to the petition, while ordinarily it is beyond the authority conferred upon the president of a corporation to interpose an answer, circumstances may exist which, in equity, would require him to file an answer, even though he has not the authority of a resolution of the directors. Otherwise, irremediable injury or perhaps a total failure of justice to the stockholders might result. The president may take such action, according to the court, where he shows that the directors, upon his application, would not act, or where it would have been futile to request them to act because of some such split of the vote as here.

Such a doctrine obviously extends the powers of the president of a corporation. Upon the facts of the instant case, the decision is a good one. It should not be extended, however, for there might then be ample reason to agree with Ward, Circuit Judge, who in his dissenting opinion says, "a practice is here approved of which may hereafter lead to dangerous consequences."

CRIMINAL LAW—RAPE—"PREVIOUSLY CHASTE CHARACTER."—The statute under which the prisoner was indicted made it a crime to "carnally know and abuse any female child . . . of previously chaste character." The prisoner requested an instruction that the phrase, "previously chaste character," was not limited to acts of sexual intercourse, but also included purity in conduct and principle. This request was refused, and the court instructed the jury that if the prosecuting witness had not previously been carnally known she was of chaste character within the meaning of the statute. *Held:* The instruction requested was properly refused. The instruction given was correct. State v. Sigler, 200 Pac. 323 (Wash. 1921).

The decisions are not uniform on the exact meaning of "chaste character" as used in statutes which define rape, seduction and abduction. The question raised in the instant case has been squarely faced in few cases. In accord with the decision in the instant case, that the question simply concerns freedom from sexual intercourse, regardless of other lewd conduct, are State v. Brinkhaus, 34 Minn. 285 (1885); Mills v. Com., 93 Va. 815, 22 S. E. 863 (1895); State v. Workman, 66 Wash. 292, 119 Pac. 751 (1911). In Georgia, all who are virgins belong to the class of "virtuous unmarried females" who may be victims of seduction, and in North Carolina they come within the statute on seduction, as "innocent and virtuous." Wood v. State, 48 Ga. 192 (1873); State v. Whitley, 141 N. C. 823, 53 S. E. 820 (1906). This interpretation of the statute is said to allow a practical test. O'Neill v. State, 85 Ga. 383, 11 S. E. 856 (1890). Under the Nebraska statute on rape every woman who has never had unlawful sexual intercourse is considered to be not "previously unchaste." Bailey v. State, 57 Neb. 706, 78 N. W. 284 (1899).

In support of the instruction requested in the instant case, the leading opinion is that in Andre v. State, 5 Iowa 389 (1857). "Character" is there given its ordinary meaning. The statute is construed as intended to protect only those who are pure in conduct and principle: "the pure in mind, the innocent in heart." Mere avoidance of sexual intercourse is not sufficient. The court uses "chastity," as distinguished from "chaste character," to convey that idea. The words in the New York statutes on abduction and seduction have also been construed as meaning pure in conduct and principle; but the courts

have not faced squarely the question raised in the instant case and in Andre v. State, *supra*. Carpenter v. People, 8 Barb. 603 (N. Y. 1850); People v. Nelson, 153 N. Y. 90 (1897). See the note in 19 Am. & Eng. Ann. Cas. 444.

"Character," as used in these statutes, does not mean reputation. Andre v. State, *supra;* People v. Nelson, *supra;* State v. Preuss, 112 Minn. 108, 127 N. W. 438 (1910). Some statutes, however, require only that the woman shall have been of "good repute for chastity" or of "good repute" (Pa. Act of May 19, 1887, P. L. 128); if these phrases are used, her reputation, and not her character, is put in issue. Bowers v. State, 29 Ohio St. 542 (1876); Foley v. State, 59 N. J. L. 1, 35 Atl. 105 (1896); Com. v. Howe, 35 Pa. Super. Ct. 554 (1908).

DIVORCE—NULLITY—AVERMENT OF IMPOTENCY QUOAD HANC.—The wife sought to have her marriage annulled on the ground that it had never been consummated, because her husband was impotent as to her, and hence incapable of consummating the marriage with her. Medical evidence proved the wife to be still a virgin, while an examination of the husband revealed no visible physical defect. *Held:* Marriage annulled. An averment that the respondent is impotent *quoad hanc* is sufficient to support a decree of nullity. Colman v. Colman, 37 Times L. R. 759 (Eng. 1921).

It is a well-established medical fact that impotency may be either absolute or relative. 1 Bishop, Marriage, Divorce and Separation, Sec. 779 (1889). In the first, there is total incapacity; in the second, the incapacity exists only as between particular parties. At the early law, it was seriously doubted whether an averment of impotency *quoad hanc* would be sufficient to support a decree of nullity. Case cited in 1 Beck, Medical Jurisprudence 161, note. It was not until the middle of the nineteenth century that the doctrine of impotency *quoad hanc* was finally and unquestionably accepted by the English courts. N., falsely called M. v. M., 2 Rob. Ecc. 625 (Eng. 1853); A., falsely called B. v. B., 1 Sp. Ecc. 12 (Eng. 1853). The earlier case of the Countess of Essex, 2 How. St. Tr. 786 (Eng. 1613), had been viewed with suspicion because of the questionable nature of the evidence adduced to prove that the petitioner was *virgo intacto* and *apta viro*.

There is little direct authority on the subject in this country. However, in those states—including Pennsylvania—which, by statute, allow impotency as grounds for divorce, it is undoubtedly the law that absolute impotency need not be alleged or proved. S. v. S., 192 Mass. 194, 77 N. E. 1025 (1906). In the recent case of Tompkins v. Tompkins, 111 Atl. 577 (N. J. Eq. 1920), the court said that non-consummation after triennial cohabitation raised the presumption of impotency *quoad hanc,* where there was no visible physical defect. See, in this connection, 69 U. OF PA. L. REV. 388.

Since impotency in the law of divorce means want of *potentia copulandi* and not merely incapacity for procreation, it would appear that there is no question as to the correctness of the above decisions. "Who possibly can say that a man is necesarily impotent as to all women?" M. v. M., *supra,* 634. Where the non-consummation of a marriage is proved and it is not explained by any patent defect, it is neither necessary, nor indeed possible, to prove universal impotency. G. v. M., L. R. 10 App. Cases 171 (Eng. 1884).

FRAUD—RIGHT OF DEFRAUDED PARTY TO SUE IN DECEIT WHEN THE CONTRACT IS PARTIALLY EXECUTED.—Plaintiff was induced by the fraud of the defendant to purchase the diseased cattle for which he gave his note in payment. Later the plaintiff renewed the note with full knowledge of the fraud, and subsequently paid it under pressure. He sued the defendant in deceit. *Held:* The plaintiff can recover, as the renewal of the note did not constitute a waiver of his action in deceit. Bringen v. Wolf, 184 N. W. 62 (Neb. 1921).

Where a contract is entirely executed, one who was induced by fraud to enter into it may either rescind it on the discovery of the fraud, by returning what he has received thereunder, or affirm the contract without restoring the consideration received, and sue for damages caused by the fraud. Lukens v. Aiken, 174 Pa. 152, 34 Atl. 575 (1896); McLain v. Parker, 229 Mo. 68, 129 S. W. 500 (1910); Goodwin v. Dick, 220 Mass. 556, 107 N. E. 925 (1915). It is a well-settled rule that one who has been induced to enter into a contract for the sale of personal property, and who later, while the contract is entirely executory, goes ahead and performs it, will be deemed to have waived the fraud, where he knew of such fraud before he performed it. Kingman & Co. v. Stoddard, 85 Fed. 740, 29 C. C. A. 413 (1898); McDonough v. Williams, 77 Ark. 261, 92 S. W. 783 (1905). Where the person complaining has partly performed his part of the contract before learning of the deceit practiced upon him, he will not be precluded from maintaining an action for damages for the fraud, even though he goes ahead and completes his contract. Peck v. Brewer, 48 Ill. 54 (1868); Del Vecchio v. Savelli, 10 Cal. App. 79, 101 Pac. 32 (1909); Bean v. Bickley, 187 Iowa 689, 174 N. W. 683 (1919). There is a line of cases that follow the opposite view. They hold that where a person has partially executed a contract, and has learned of the fraud by which he was induced to enter the contract, he cannot then exact performance from the other party, receive the benefits, and still maintain an action of deceit. The performance of the contract under such circumstances acts as a waiver of a person's right to sue for the fraud. Simon v. Goodyear Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612 (1900); Ponder v. Alturo Farms Co., 57 Colo. 519, 143 Pac. 570 (1914).

The former view seems to have the weight of authority. Courts holding the contrary seem to fail to make a clear distinction between affirming the contract and failing to rescind it. The original contract is merely voidable, and the defrauded party should be able to treat it as a good contract where he has already partly performed, demanding that the other party should make the contract as good as it seemed. A mere assent or agreement to carry on the contract by the defrauded party without a rescission or formal release should not act as a waiver of a right or action for fraud that has already accrued. It is therefore submitted that the decision in the principal case is a correct statement of the law.

INTERSTATE COMMERCE—EFFECT OF JOINT RATES ON DISCRIMINATION.—The "A" R. R. Co. grants to shippers, including the competitors of the "'X" Creosoting Co., the privilege of creosoting-in-transit. This arrangement permits forest products received by a railroad for shipment to be unloaded at an intermediate point, subjected to the process of creosoting, and forwarded on the original

bill of lading to the destination therein named. The "X" Co. is refused this privilege by the "B" R. R. Co., a carrier which connects and has joint rates with the "A" Co., but which has no other relations with it. *Held:* The "B" Co. is not guilty of unjust discrimination against the "X" Co. Central R. R., *et al.*, v. U. S., *et. al.*, U. S. Supreme Court, No. 436, October Term, 1921, decided December 5, 1921.

The decision reversed an order of the Interstate Commerce Commission. American Creosoting Co. v. Director General, 61 I. C. C. 145 (1921). The Commission held that the "B" Co., in so far as it participated in joint rates with the "A" Co., unjustly discriminated against the "X" Co., and thereby violated that part of section 3 of the Commerce Act of 1887, 24 U. S. Stat. at Large 379, which forbids the subjecting of any shipper to undue or unreasonable prejudice or disadvantage. The Supreme Court held, however, that the discrimination was not attributable to the "B" Co. merely because it participated in the joint rates. As well before as since the Act of 1887, it has been held that an agreement of connecting carriers for through freight rates does not make them partners nor liable as such. Ins. Co. v. R. R. Co., 104 U. S. 146, 26 L. Ed. 679 (1881); Deming v. N. & W. R. R. Co., 21 Fed. 25 (C. C. 1884); Pa. R. R. Co. v. Jones, 155 U. S. 333, 39 L. Ed. 176 (1894). There is a *dictum* in Penn Ref. Co. v. West N. Y. & P. R. R. Co., 208 U. S. 208, 52 L. Ed. 456 (1908), which intimates that the Supreme Court would not treat the adoption of joint through rates as a reason for holding a connecting carrier guilty of discrimination The only direct decisions on the point in question are by the Commission itself, and curiously they are *contra* to the decision of the Commission in the principal case. So it was held not to be discrimination for a carrier serving Indianapolis to refuse the privilege of storage-in-transit of apples to commission merchants of that city, although it had joint rates with western lines which permit the arrangement. Indianapolis C. of C. v. C. C. E. & St. Louis Ry. Co., 34 I. C. C. 267 (1915). Similarly it was held not to effect unjust discrimination to refuse to grant the privilege of grinding and re-shipping cottonseed cake, though the carrier had joint rates with other carriers which allowed it. Meridian Grain & Elevator Co. v. A. & V. Ry. Co., 38 I. C. C. 478 (1916). The Commission recognized these decisions in the principal case, but regarded them as no longer controlling in view of the enlarged powers conferred upon it by the Transportation Act of 1920, 41 U. S. Stat. at Large 484. This act provides that whenever the Commission shall be of opinion that any practice of a carrier is unjustly discriminatory, it may order the practice stopped and prescribe the practice which should be followed.

The view of the Supreme Court is clearly correct. Even under the broad powers of the Act of 1920, the Commission has no authority to order a carrier to stop a discrimination for which the carrier is not responsible. That a connecting carrier is not responsible for a discrimination merely because it has joint rates with an original carrier is correct in principle and authority.

LANDLORD AND TENANT—LEASE—COVENANT NOT TO ASSIGN WITHOUT LESSOR'S CONSENT.—The lease contained a covenant that the tenant was not to assign without the landlord's consent, which was not to be unreasonably withheld. The landlord refused to consent to an assignment because he wanted

the premises himself and had been negotiating to purchase the residue of the tenant's term. The tenant asked for a declaration that the landlord had unreasonably withheld his consent, and that he could assign without consent. *Held:* The tenant could assign without the landlord's consent, as it had been unreasonably withheld. Chatterton v. Evison, 125 Law Times R. 159 (Eng. 1921).

In England, it is held unreasonable for a landlord to withhold his consent because he wishes to obtain the premises himself. Lehmann v. McArthur, 16 Law Times R. 196 (Eng. 1867); Bates v. Donaldson, 74 Law Times R. 751 (Eng. 1896). In the principal case, the court applies the rule in Bates v. Donaldson, *supra,* but carries it farther. In Bates v. Donaldson the court said that if there had been negotiations between the landlord and tenant, the case might have been different. In the instant case, the court interprets this statement as meaning there might be room for argument, but decides that the negotiations are immaterial, taking the view that the only object of the covenant is to give the lessor a voice in choosing an acceptable assignee, and that therefore the consent was unreasonably withheld. An unreasonable refusal leaves the tenant at liberty to assign without consent. Treloar v. Bigge, L. R. 9 Exch. 151 (Eng. 1874); Lepla v. Rogers, 68 Law Times R. 584 (Eng. 1892).

There is no direct authority on this point in the United States, but it is well established that a covenant not to assign without the landlord's consent is for the landlord's benefit only, Maddox v. Westcott, 156 Ala. 492; 147 So. 170 (1908); Jackson v. Knight, 194 S. W. 844 (Tex. 1917); such covenants are not favored, and, as a result, are strictly construed. Postal Telegraph & Cable Co. v. Western Union Telegraph Co., 155 Ill. 335; 40 N. E. 587 (1895); Christ v. Rake, 287 Ill. 619; 122 N. E. 854 (1919). Thus it seems probable that the American courts would follow the English rule and hold that it is unreasonable for a landlord to withhold his consent unless he has a valid objection to the assignee.

LIBEL—PUBLICATION—DICTATION TO STENOGRAPHER.—Defendant dictated to his stenographer a libellous letter concerning the plaintiff. *Held;* The dictation was a sufficient publication to support an action of libel. Nelson v. Whitten, 272 Fed. 135 (D. C. 1921).

The courts are not in harmony as to whether the dictation to a stenographer of a communication which is not privileged is a sufficient publication, when the dictating is done by an agent of the defendant. The majority view is according to the affirmative of this proposition. Pullman v. Hill & Co., L. R. (1891) 1 Q. B. 524 (Eng.); Sun Assurance Company of Canada v. Bailey, 101 Va. 443, 44 S. E. 692 (1903). The minority view is that there is no publication, since the act of dictating and that of copying constitute but one act; the production of the letter. Owen v. Ogilvie Publishng Company, 32 App. Div. 465, 53 N. Y. S. 1033 (1898).

If the communication is not privileged and the dictation is by the defendant, himself, no doubt all courts would hold this to be a sufficient publication. Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901); Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909).

If, however, the communication is privileged, being in the course of the defendant's business, the dictation to a stenographer would not destroy the privilege. Boxsius v. Goblet Frères, *et al.*, L. R. (1894) 1 Q. B. 842 (Eng.); Harper v. Hamilton Retail Grocers' Association, *et al.*, 32 Ontario 295 (Can. 1901); Edmondson v. Birch & Company, *et al.*, L. R. (1907) 1 K. B. 371 (Eng.).

The holding in the instant case is in harmony with most authorities, although a like holding is criticized in Odgers on Libel and Slander, fourth edition, p. 154: "The fact that spoken words are intended to be written down after they are uttered does not make their utterance the publication of a libel."

MASTER AND SERVANT—RIGHT OF EMPLOYE WRONGFULLY DISCHARGED TO SUE ON CONTRACT.—Plaintiff, who was under a contract to serve the defendant company for a year, was wrongfully discharged before the termination of that period. He now sues to recover wages accruing after the date of his discharge. *Held:* There can be no recovery on the contract, but plaintiff is left to an action for damages for the breach of the contract by defendant. Harrington v. Empire Cream Separator Co., 115 Atl. 89 (Me. 1921).

At common law, the doctrine of "constructive service" was adopted in the case of Gandell v. Pontigny, 4 Campb. 375 (Eng. 1816), by which a discharged employe was allowed to recover wages for work and labor not actually performed under an *indebitatus* count. By this doctrine, the offer of performance of a contract of service, which performance is prevented by the other party to the contract, is treated as performance entitling the person offering performance to the whole compensation agreed to be given. This rule is still in force in a number of American jurisdictions. Cox v. Bearden, 84 Ga. 304, 10 S. E. 627 (1889); Allen v. Colliery Engineers' Company, 196 Pa. 512, 46 Atl. 899 (1900).

However, the modern rule, obtaining in England and in a majority of the courts of this country, has repudiated the "constructive service" theory, and has restricted the employe's rights to a recovery of such damages as he has sustained by the wrongful discharge. Wood v. Moyes, 1 Weekly Rep. 166 (Eng. 1853); James v. Allen County, 44 Ohio 226, 6 N. E. 246 (1886); Olmstead v. Bach, 78 Md. 132, 27 Atl. 501 (1893); Arnold v. Adams, 27 App. Div. 345, 49 N. Y. S. 1941 (1898). The measure of damages under this rule is the difference between the amount which would, after the employe's discharge, accrue to him under the contract if continued in force, and the amount which during that time he earned, or, by reasonable diligence, might have earned.

The majority rule, which is followed in the principal case, seems to be more sound for theoretical and practical reasons than the "constructive service" doctrine. Wages are predicated on the existence of the relation of master and servant, and after the termination of that relation, even though wrongfully, it is difficult to see why an action on the contract for such wages should be allowed. There is also the tendency of the old rule to instil a spirit of laziness in a wrongfully discharged employe. Since he is sure of obtaining his wages, there is no incentive to seek other employment or to take it if he can find it.

NEGLIGENCE—LIABILITY OF CARRIER FOR KNOWN DANGERS.—When the doors of a private warehouse. situated on a switch from the main tracks, were wide open, they extended out far enough to strike the sides of passing trains. To prevent this, a post was placed in the defendants' right-of-way by an unascertained person, and it was removed by the defendant's workmen. The plaintiff was injured by one of the doors swinging out against the car wherein she was a passenger. *Held:* The defendant is not liable; the opening of the doors, and not the removal of the post, was the proximate cause of the accident. Kelley v. Philadelphia, Baltimore & Washington R. R. Co., 270 Pa. 149, 113 Atl. 194 (1921).

In general it is the law in the United States that a carrier of passengers is not an insurer against all accidents to passengers, but is responsible for an injury only when guilty of some negligence. Simmons v. New Bedford Steamboat Co., 97 Mass. 361 (1867); Fredericks v. Northern Central R. R., 157 Pa. 103, 27 Atl. 689 (1893); New York, *etc.*, R. Co. v. Lincoln, 223 Fed. 896, 139 C. C. A. 334 (1915). The degree of care that a carrier owes to its passengers is a question of law, and is defined in formulas varying from "reasonable" to "highest" degree. Analyzing these expressions, they mean usually a degree of care which is reasonable in view of the relation of the parties and the surrounding circumstances. Carothers v. Pittsburgh R. Co., 229 Pa. 558, 79 Atl. 134 (1910); Buckley v. Boston Elevated R. Co., 215 Mass. 50, 102 N. E. 75 (1913). If a carrier knows that a danger exists, it owes a duty to take proper steps to protect its passengers. Thus it must protect a passenger against preventable injuries from fellow-passengers. United Railway Co. v. Deane, 93 Md. 619, 49 Atl. 923 (1901); Bryant v. Boston Elevated Co., 232 Mass. 549, 122 N. E. 744 (1919). Where a carrier fails to protect its passengers from the misconduct of strangers, which it knew of in time to prevent, it is liable. Exton v. Central Railroad of New Jersey, 62 N. J. L. 7, 42 Atl. 486 (1898); Brown v. Chicago, *etc.*, R. Co., 139 Fed. 972, 72 C. C. A. 20 (1905). A carrier is also liable where injury results from its own structure built too close to its right-of-way, or that of a stranger when it has failed to warn its passengers properly. Francis v. N. Y. Steam R. Co., 114 N. Y. 380, 21 N. E. 988 (1889); Sawin v. Conn. Valley St. Ry. Co., 213 Mass. 103, 99 N. E. 952 (1912).

It is submitted that the court erred in the principal case in holding that the defendant owed no duty to protect its passengers from such a danger. The line of cases which it follows deals with circumstances that are not known by the carrier to exist before the accident occurs. In the principal case the railroad knew that its passengers might be endangered at any moment by the opening of these doors. The defendant therefore owed a duty to take means of protecting its passengers from a known danger. Its failure to do so should render it liable.

NEGLIGENCE—LIABILITY OF MANUFACTURER OF DEFECTIVE INSTRUMENTALITY—INJURY TO PROPERTY.—Plaintiff's hogs were innoculated with a serum manufactured by the defendant. Because of the alleged negligent preparation of this serum, the hogs died. *Held:* Serum is an imminently dangerous and poisonous substance, and the manufacturer is liable. Murphy v. Sioux Falls Serum Co., 184 N. W. 252 (S. D. 1921).

The general doctrine is that a manufacturer is not liable for negligence in the making of articles or substances, to third persons with whom there is no privity of contract. Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891); Heizer v. Kingsland Co., 110 Mo. 605, 19 S. W. 630 (1892); Bragdon v. Perkins Campbell Co., 87 Fed. 109, 30 C. C. A. 567 (1898). This is subject to exception when the substances are imminently dangerous and by their nature calculated to be injurious to human life. Thomas v. Winchester, 6 N. Y. 410 (1852); Norton v. Sewall, 106 Mass. 143 (1870); Smith v. Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73 (1896). In such cases, although the maker is ignorant of the defect, he is liable to the ultimate user. He should know, and is presumed to know the nature of the substance he creates if that substance is inherently harmful, Thornhill v. Carpenter Morton Co., 220 Mass. 593, 108 N. E. 474 (1915), and he is under a legal duty to see to it that no foreign substance enters the process which would make the article highly injurious. Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152 (1905); Salmon v. Libby, McNeill & Libby, 219 Ill. 421, 76 N. E. 573 (1905); Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314 (1908).

All of the cases cited above, however, are concerned with substances affecting human life. It does not appear that the doctrine in reference to things imminently dangerous has ever before been applied to those injurious to animate property. In Skinn v. Reutter, 135 Mich. 57, 97 N. W. 152 (1903), the court assumed that an act causing disease in hogs was an act imminently dangerous to human life. The decision in the principal case is not based on any such assumption. It is a novel and unqualified application of the doctrine to animate property. Holding serum to be in the class of imminently dangerous substances is the logical result of the decisions in which medicines were held to be such, Thomas v. Winchester, *supra;* Norton v. Sewall, *supra,* but the serum in this case did not endanger human life; and therein lies the significance of the case. It seems perfectly reasonable and just that, where a defect in a substance is unascertainable to the ordinary person and will inevitably cause damages, as in this case, the manufacturer should be liable to the user. Whether other courts will take this view and apply the doctrine where inanimate, as well as animate property is endangered, remains to be seen.

NEGLIGENCE—RAILROADS—LAST CLEAR CHANCE.—The decedent attempted to cross the tracks of the defendant railroad company, noticing a locomotive approaching slowly about fifty yards away, but failed to stop his truck. His engine stalled while on the tracks, and before he could restart it, the locomotive crashed into him, causing his death. The evidence tended to show negligence on the part of the defendant company, in that the engineer was warned to stop the locomotive by the brakeman, and could have done so in plenty of time to have averted the accident. *Held:* There can be no recovery because of decedent's failure to stop, look and listen. Decedent was bound to anticipate that the motor of his engine might stall on the tracks. Feudale v. Hines, 271 Pa. 199, 114 Atl. 497 (1921).

The Pennsylvania rule is firmly established that a failure by the driver of a vehicle to stop, look and listen in a substantial and careful manner before

crossing railroad tracks is contributory negligence which will be a bar to recovery. Ihrig v. Erie R. R. Co., 210 Pa. 98, 59 Atl. 686 (1904). On the other hand, the requirement of "stopping" has not been held essential under all circumstances in most of the other jurisdictions. Dickinson v. Erie R. R. Co., 81 N. J. L. 464, 81 Atl. 104 (1911).

In directing judgment for the defendant company without allowing the question of its own negligence to go to the jury, the court refused to apply the rule of "last clear chance." In a case somewhat similar to the principal case, the doctrine was invoked. Nicol v. Oregon-Washington R. R. Co., 71 Wash. 409, 128 Pac. 628 (1912). There it was held that the plaintiff's negligence had terminated after his engine had stalled, and since the defendant might have averted the accident by exercising reasonable care, he also was negligent, and his failure to do so was the proximate cause of the collision he having the last clear chance of preventing it.

This is the view taken in the principal case by Mr. Justice Simpson in a vigorous dissenting opinion, in which he says that the plaintiff's contributory negligence should not conclusively bar his recovery, when the jury could have found that the defendant company was either grossly negligent or else wilfully ran into the plaintiff's truck.

This view, it is submitted, is more in consonance with justice and the modern attitude of an increasing number of American courts. To bar a recovery, simply because the driver failed to stop his car, which operation would probably have made no difference in the actual facts of the case, seems to be an unreasonable extension of the "stop, look and listen" rule. It is also submitted that had the decedent stopped his truck, and then looked and listened, he would have been justified in attempting to cross the tracks, in view of the distance the locomotive was away from him and its exceedingly slow rate of speed. To penalize him, then, for his failure to anticipate the stalling of his motor, would seem to be placing an undue burden on those who are compelled to use railroad crossings, to the undue advantage of the party who failed to use even ordinary care.

PARTNERSHIPS — IN BETTING TRANSACTIONS — BOOKMAKERS. — Plaintiffs were two bookmakers, in partnership, suing under a statute for the recovery of money lost and paid to the defendant. Defendant objected to the suit in the partnrship name, and cited a statute which prevents an agent from recovering betting losses paid by him for the principal; and the defendant alleges that this makes a partnership impossible. *Held:* A betting partnership can exist. Jeffrey & Co. v. Bamford, 125 Law Times R. 348 (Eng. 1921).

The Gaming Acts of 1835 (5 & 6 Wm. 4, c. 41); 1845 (8 & 9 Vict., c. 109), s. 18; 1853 (16 & 17 Vict., c. 119); 1892 (55 & 56 Vict., c. 9), s. 1, are generally construed as merely rendering unenforceable promises made in the usual course of bookmaking, and not as changing the common law so as to impute any wrong or illegality to the ordinary business of the professional bookmaker. Beeston v. Beeston, L. R. 1 Exch. Div. 13 (Eng. 1875); Bridger v. Savage, L. R. 15 Q. B. Div. 363 (Eng. 1885). Accordingly a partnership in the bookmaking business being not illegal *per se* is recognized as not contrary to public policy. Partridge v. Mallandaine, L. R. 18 Q. B. Div. 276 (Eng.

1886); Thwaites v. Coulthwaite, L. R. 1 Ch. 496 (Eng. 1896); Brookman v. Mather, 29 Times L. R. 276 (Eng. 1913). The court in Thomas v. Dey, 24 Times L. R. 272 (Eng. 1908), held that it was against public policy to allow such a partnership.

The existence of such a partnership is also made questionable by the Gaming Act of 1892, *supra,* by which an agent cannot recover money paid by him for losses on the principal's betting accounts. This seems to nullify a fundamental characteristic of a partnership, because if one partner acting as agent of the other should pay out money in the course of business, he could not recover any part of it from the other partner. This act, together with reasons of public policy, was the basis of a strong dissenting opinion in Hyams v. Stuart King, L. R. (1908) 2 K. B. 718 (Eng.), which was followed by O'Connor v. Ralston, L. R. (1920), 3 K. B. 451 (Eng.).

The principal case, directly overruling O'Connor v. Ralston, *supra,* decided a little more than a year before, indicates that there is a sharp conflict of opinion on the question in England. The principal case, however, seems to be correct both on principle and authority. The mere fact that the Act of 1892, *supra,* negatives the right of one partner to recover money paid out in lost bets from the other should not preclude the existence of a partnership. It is still "carrying on a business in common with a view to profit." Partnership Act of 1890 (53 & 54 Vict., c. 39), s. 1.

In America the courts have taken a more antagonistic view toward all wagering contracts, and have termed wagers on horse races immoral and contrary to sound public policy. Wilkinson v. Torseley, 16 Minn. 299 (1871); Morgan v. Beaumont, 121 Mass. 7 (1876); Gridley v. Dorn, 57 Cal. 78 (1880). Pennsylvania at an early date adopted an act making wagers void and punishable. Act of April 22, 1794; 3 Sm. L. 177.

In accordance with the attitude expressed above as to the morality of betting, it naturally follows that the courts will not uphold a betting partnership in a faro game, Whitesides v. McGrath, 15 La. Ann. 401 (1860), or in running a roulette wheel, Berns v. Shaw, 65 W. Va. 667, 64 S. E. 930 (1909). Nor are they any more indulgent to partnerships of bookmakers; they refuse to recognize the partnership as a party, or to decree an account by one partner for another. Shaffner v. Pinchback, 133 Ill. 410 (1890); Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268 (1898); Central Trust & Safe Deposit Co. v. Respass, 112 Ky. 606, 66 S. W. 421 (1902).

Whether it is because of the greater press of more essential court business in this country or solely because of our more puritanical attitude, the decided tendency in America, far more than in England, is to outlaw all transactions related to wagering and gambling.

SLANDER—BY AGENT OF CORPORATION—LIABILITY OF CORPORATION.—The plaintiff was insured with the defendant company and made a claim under the policy for sick benefits. An agent of the defendant stated to several persons that the plaintiff was not entitled to benefits since her ailment was due to venereal disease. *Held:* The plaintiff cannot recover, since the slander was not expressly authorized nor subsequently ratified by the defendant. National Life Insurance Company v. Abernathy, 89 So. 725 (Ala. 1921).

There was an old doctrine, both in the United States and England, that, since there was no agency to slander, and since a corporation acted only through its agents, it could not be guilty of this offense. Childs v. The Bank of the State of Missouri, 17 Mo. 213 (1852); Townshend on Libel and Slander, 4th edition, page 474. This theory, however, has been exploded long since in both countries. The Corporation of Glasgow v. Lorimer, L. R. (1911), A. C. 209 (Eng.); Payton v. People's Credit Clothing Co., 136 Mo. App. 577, 118 S. W. 531 (1909).

At present there are two views as to the circumstances necessary to make the corporation amenable for slander. According to the minority view, that followed in the instant case, the slander must be either *expressly* authorized or subsequently ratified. Behre v. National Cash Register Co., 100 Ga. 213, 27 S. E. 986 (1897); Singer Manufacturing Co., *et al.*, v. Taylor, 150 Ala. 574, 43 So. 210 (1907); Flaherty v. Maxwell Co., 187 Mich. 62, 153 N. W. 45 (1915). According to the majority view, however, it is sufficient that the agent was acting within the scope of his employment. The Corporation of Glasgow v. Lorimer, *supra;* Palmeri v. The Manhattan Railway Co., 133 N. Y. 261, 30 N. E. 1001 (1892); Rivers v. Yazoo & Mississippi Railroad Company, 90 Miss. 196, 43 So. 471 (1907); Lee v. McCrory Stores Corporation, 109 S. E. 111 (S. C. 1921).

The rule of *stare decisis* is no doubt the reason for the holding in the principal case. The first case to decide this question in Alabama was Singer Manufacturing Company, *et al.*, v. Taylor, *supra,* and all the later cases cited it with approval. The only authority cited in that case for its holding was Odgers on Libel and Slander, 3rd edition, p. 435: "A corporation is not liable for any slander uttered by an officer unless it can be proved that the corporation expressly ordered and directed that officer to say those very words." This statement, however, is not contained in his last edition, which would indicate that he did not approve of it.

In fact, there is no reason why a corporation should not be liable civilly, the same as natural persons, for wrongs committed by their agents acting in the scope of their employment.

TAXATION—INCOME TAX—BEQUESTS TO EXECUTORS.—Testator made bequests to his executors with the proviso that such bequests should be in lieu of any compensation to which they would otherwise be entitled. *Held:* The bequests, in part at least, were compensation for personal services, and subject in part to payment of income tax under the Act of September 8, 1916, par. 2 (a), as amended by the Act of October 3, 1917, par. 1200. U. S. v. Vanderbilt, 275 Fed. 109 (D. C. 1921).

Bequests are exempt from income tax. U. S. Revenue Act of 1918, par. 213 (b) and par. 233. The defendants argued that the bequests in the principal case were payable whether or not the executors completed their services, and that, therefore, they were strictly bequests, and could not properly be regarded as compensation for personal services.

In England, bequests to executors are payable, if the executors prove the will, Reed v. Devaynes, 2 Cox 285 (Eng. 1791); and even though they do not prove the will, provided they do some act as executors. Harrison v.

Rowley, 4 Ves. 212 (Eng. 1798); Lewis v. Matthews, L. R. 8 Eq., 277 (Eng. 1869).

In the United States, there seems to be a tendency, according to the court in the principal case, to regard such bequests as compensation which must be earned. Thus, it has been held that an executor cannot recover the statutory commission in addition to a bequest to him, on the ground that the bequest was compensation and not a gift. Renshaw v. Williams, 75 Md. 498, 23 Atl. 905 (1892). In other jurisdictions it has been held that bequests to executors will be given preference over other legacies, because the services of the executors constitute valuable consideration and legacies with consideration are entitled to priority to general legacies when there is a deficiency of assets. In Harper's Appeal, 111 Pa. 243, 2 Atl. 861 (1885); Richardson v. Richardson, 145 App. Div. 540, 129 N. Y. S. 974 (1911).

The court in the principal case states that the bequests to the executors are subject, in part at least, to payment of an income tax as compensation for personal services, but does not decide by what rule the amount taxable is to be determined. It would seem that such bequests should be held either taxable as a whole or not taxable at all. It is difficult to conceive how a court could determine what part of such a bequest is strictly a gift, and what part is compensation for services as executor.